

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GENE RICHARD BURKS,

Defendant-Appellant.

UNPUBLISHED

April 16, 2009

No. 274134

Alger Circuit Court

LC No. 05-001716-FH

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

A jury convicted defendant Gene Burks of assault on a prison employee.¹ The trial court sentenced Burks as a second habitual offender² to two to six years' imprisonment. The trial court made this sentence consecutive to a sentence Burks was then serving. Burks appeals as of right. We affirm.

I. Ineffective Assistance Of Counsel

A. Standard Of Review

Burks contends that his trial counsel was constitutionally ineffective because counsel failed to enter into a stipulation with the prosecutor concerning the number and nature of his prior convictions. According to Burks, this failure enabled the prosecutor to present unfairly prejudicial evidence of his prior convictions for felonious assault and armed robbery and to tell the jury that he was still serving time for the armed robbery conviction. Further, according to Burks, his counsel's failure to stipulate to the prior convictions allowed the prosecutor to argue to the jury that he showed by his choices that he was still not ready to live in civilized society.

To preserve a claim of ineffective assistance, a defendant is required to move for a new trial or an evidentiary hearing.³ Here, Burks failed to present the requisite motion in the trial

¹ MCL 750.197c(1).

² MCL 769.10.

³ *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

court. (The trial court record contains a hand-written motion “Motion for a [sic] Evidentiary Hearing at trial to raise a Sixth Amendment ineffective assistance of trail [sic] counsel claim to raise the Diminished Capacity insanity Defense,” filed by defendant in pro per immediately after conviction and before sentencing. As indicated by its title, the motion claimed counsel was ineffective for failure to pursue a defense of diminished capacity or insanity by reason of Burks’ extended confinement in prison. There was no request before sentencing for an evidentiary hearing regarding the specific ineffective assistance claim Burks now raises on appeal. Further, Burks’ appellate counsel moved in this Court on March 21, 2007, to remand the case for an evidentiary hearing on ineffective assistance of counsel and raised the issue this appeal presents. This Court denied the motion to remand “for failure to persuade the Court of the necessity of a remand at this time.”⁴) Therefore, Burks did not preserve this issue for appellate review. We review unpreserved constitutional claims for plain error.⁵ Our review is limited to mistakes apparent on the existing record.⁶ If the record does not support his claim, a defendant is deemed to have effectively waived the issue of ineffective assistance.⁷

B. Legal Standards

“[T]o find that a defendant’s right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.”⁸ “A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel’s error, the outcome of the trial would have been different.”⁹

C. Applying The Standards

We conclude that Burks has failed to prove that his trial counsel’s failure to offer to stipulate to the fact that he was lawfully imprisoned constituted deficient performance that was below an objective standard of reasonableness, or that it prejudiced him by denying him a fair trial. A decision whether to reveal damaging information or to object to a witness’s revelation of a defendant’s prior convictions, is a matter of trial strategy.¹⁰ This Court is required to refrain

⁴ *People v Burks*, unpublished order of the Court of Appeals, entered April 20, 2007 (Docket No. 274134).

⁵ *People v Carines*, 460 Mich 750, 752-753, 763; 597 NW2d 130 (1999).

⁶ *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

⁷ *Sabin*, *supra* at 659, citing *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

⁸ *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

⁹ *Sabin*, *supra* at 659, citing *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

¹⁰ *People v Armstrong*, 100 Mich App 423, 426; 298 NW2d 752 (1980); *People v Hunter*, 141 Mich App 225, 230-231; 367 NW2d 70 (1985).

from second-guessing trial counsel concerning matters of trial strategy.¹¹ There is a strong presumption that counsel provided effective assistance.¹²

We note that Burks' residence in the segregation wing of a maximum security prison clearly indicated that he was a convicted felon who the prison administration viewed as a dangerous individual. Ample testimony indicated that he was the recipient of numerous misconduct tickets for violating prison rules. Recognizing these facts, it was not an unreasonable trial strategy to conclude that a stipulation to bar any mention of the nature of Burks' prior convictions would have been a futile gesture. In fact, such a stipulation could be counter-productive in that the jury, knowing that Burks was imprisoned for some serious offense requiring confinement in a maximum security facility, could have speculated that he had been convicted of something far worse than felonious assault and armed robbery. Accordingly, we conclude that Burks has failed to overcome the strong presumption that his counsel's actions were based on a reasonable trial strategy.

Further, there was substantial evidence of Burks' guilt. There was no dispute that Burks was a lawfully confined prison inmate. There was no dispute that a prison guard was drenched with liquefied feces from a vial or cup. A videotape recording substantiated the testimony of the prison guard that Burks' arm came out of the slot in his cell door, that there was no cup on the book cart the prison guard used, and that the prison guard immediately went to the telephone to report the incident. The evidence further showed that Burks was upset by the prospect of getting a misconduct ticket from the prison guard, but there is no support for Burks' assertion that the prison guard would have been motivated to create another misconduct incident. And there was certainly no evidence that the prison guard was motivated to a degree that she would have obtained a cup of liquefied feces, somehow hid it from the camera, the other prisoners, and her fellow guards, and then, at the opportune time that Burks' arm came out of his cell, dumped the liquefied feces on herself.

Considering both that counsel's decision was a matter of trial strategy and the substantial evidence of Burks' guilt, we conclude that the jury was not prejudiced by information concerning his prior convictions to the point that it found him guilty on the basis of his record rather than the evidence of his assaultive behavior. The existing record does not establish any plain error or substantiate Burks' claim of ineffective assistance of counsel.¹³

II. Discovery

A. Standard Of Review

Burks contends that the trial court abused its discretion by refusing to grant him access to the personnel files of the guard he was accused of assaulting and of another guard who was present that day. Burks told the trial court that he thought the records would be relevant because

¹¹ *Pickens, supra* at 330; *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

¹² *Stanaway, supra* at 687; *Sabin, supra* at 659.

¹³ *Sabin, supra* at 659.

he believed they would indicate how many misconduct tickets these two particular officers wrote against him, and he claimed this information would assist him in cross-examination. The trial court ruled that Burks' showing was insufficient to justify disclosing the personnel files. We agree.

Burks requested discovery of the two personnel files before trial and the trial court denied his request, so this issue is preserved for appellate review.¹⁴ "A trial court's decision regarding discovery is reviewed for [an] abuse of discretion."¹⁵ An abuse of discretion occurs when a court's decision is outside the principled range of possible outcomes.¹⁶

B. Legal Standards

In *People v Greenfield*,¹⁷ this Court held that "discovery in criminal cases is constrained by the limitations expressly set forth in the reciprocal criminal discovery rule promulgated by our Supreme Court, MCR 6.201." Citing our Supreme Court's decision in *Phillips*,¹⁸ this Court concluded that *Phillips* had held that "unless the [court] rule requires production of the information or the party seeking discovery shows good cause, a trial court is without authority to mandate discovery."¹⁹

The court rule provides for certain mandatory discovery and also for discovery of certain information known to the prosecuting attorney.²⁰ The rule further prohibits discovery of certain material.²¹ Finally, the rule provides that "[o]n good cause shown, the court may order a modification of the requirements and the prohibitions of this rule."²²

C. Applying The Standards

Burks does not contend that the trial court's ruling violated subsections (A), (B), or (C) of the rule, and clearly his request for access to the personnel files of the prison guards does not fall under any of the discoverable materials contained in those subsections. "It is axiomatic that the failure to produce evidence that does not fall within any category of discoverable material does

¹⁴ *People v Cain*, 238 Mich App 95, 108, 122; 605 NW2d 28 (1999).

¹⁵ *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003), citing *Stanaway*, *supra* at 680; see also *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996) ("[t]he decision to order an in camera review is discretionary").

¹⁶ *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

¹⁷ *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 447; 722 NW2d 254 (2006).

¹⁸ *Phillips*, *supra* at 593.

¹⁹ *Greenfield*, *supra* at 448-449.

²⁰ MCR 6.201(A) and (B).

²¹ MCR 6.201(C).

²² MCR 6.201(I).

not constitute good cause to support a discovery order.”²³ Accordingly, Burks had to show good cause in order to obtain the discovery he sought.²⁴ The trial court concluded that Burks’ showing of need was “insufficient to require them to turn over personnel files”; that is, that Burks failed to show good cause. We agree.

Defense counsel’s request for discovery of the guards’ personnel files was premised on the fact that he *thought* they would be relevant because he *believed* they would reveal how many misconduct tickets these two guards had written against Burks. Counsel’s request was therefore speculative and was in the nature of a forbidden “fishing expedition.”²⁵

Further, the testimony at trial did not show that discovery from the personnel files would have been necessary to effectuate Burks’ due process right to a fair trial. The prison guard was asked to recall how many misconducts tickets she had written, and she recalled having written four or five. Burks, on the other hand, claimed she had written six or seven misconduct tickets against him. Thus, even if Burks’ recollection was correct, it was not a significant point. Showing that the guard had failed to remember writing one or two additional misconduct tickets did not constitute a particularly significant discrepancy in her testimony. Also, it appears from our review of the record that the guard differentiated between major misconducts (for which a ticket would be written) and minor misconducts (for which a ticket would not be written). At least one of the misconducts that Burks’ testified about was, as he conceded, classified as a minor misconduct. This further supports our conclusion that there was no significant discrepancy between the testimony of Burks and of the guard on this point.

With regard to the second guard, he testified that he did not write any misconduct tickets for Burks. When Burks listed the other officers who wrote misconduct tickets against him, he did not mention that guard. Therefore, it is unlikely that any discoverable evidence existed in that guard’s personnel file, and it could not have been an abuse of discretion to deny Burks access to that file.

Burks argues that the trial court should have conducted an in camera review of the personnel files. Burks cites this Court’s unpublished opinion in *People v Winfrey*.²⁶ Unpublished opinions of this Court are not precedentially binding.²⁷ In any event, unlike the present case, the defendant in *Winfrey* preserved the issue by moving for an in camera review of the officer’s personnel file to determine if the officer had previously used excessive force against a citizen.²⁸ Nevertheless, this Court concluded that no abuse of discretion was shown because

²³ *Greenfield*, *supra* at 451.

²⁴ MCR 6.201(I); *Greenfield*, *supra* at 448-449.

²⁵ *People v Maranian*, 359 Mich 361, 368; 102 NW2d 568 (1960); *Stanaway*, *supra* at 680.

²⁶ *People v Winfrey*, unpublished opinion per curiam of the Court of Appeals, issued March 3, 2005 (Docket No. 250247).

²⁷ MCR 2.715(C)(1).

²⁸ *Winfrey*, *supra* at 3.

the defendant failed to show any factual support that the file might contain helpful information, and the request was simply a fishing expedition.²⁹

Here, Burks did not request that the trial court make an in camera inspection of the files. Therefore, he cannot claim an abuse of discretion because the trial court failed to do something he never requested that it do. Moreover, the option of conducting an in camera review is only triggered after a showing of good cause. Absent good cause for discovery of materials that are not listed in the court rule, the trial court is without authority to order discovery.³⁰ The trial court ruled that Burks' showing was insufficient; that is, that he failed to demonstrate good cause. We find no abuse of discretion in that ruling.

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro

²⁹ *Id.* at 4.

³⁰ *Phillips, supra* at 591-593; *Greenfield, supra* at 449 (“because defendant made no showing of good cause, the district court erred as a matter of law in ordering the production of the tape”).